

**STATE OF MICHIGAN
IN THE SUPREME COURT**

ON APPEAL FROM THE COURT OF APPEALS
Kirsten Frank Kelly, P.J., and Douglas B. Shapiro and Ronayne Krause, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court
No. **147735**

-VS-

Court of Appeals
No. **312966**

THABO JONES,

Defendant-Appellee.

Lower Court
No. **12-003749-FH**

APPELLEE'S BRIEF

*****ORAL ARGUMENT REQUESTED*****

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SUMMARY OF ARGUMENT

On October 31, 2010, several enactments of the Michigan Legislature took effect, considerably affecting the Michigan Motor Vehicle Code, *MCL 257.600 et seq.* Among the changes effected by the Legislature was the creation of a new offense, reckless driving causing death, *MCL 257.626(4)*, a fifteen year felony. The next subsection of that statute, §626(5), forbade a judge in a jury trial on that offense to instruct the jury on the necessarily lesser included offense of moving violation causing death, *MCL 257.601d*, a one year misdemeanor.

Defendant-Appellee herein argues that *MCL 257.626(5)* is unconstitutional on two grounds: First, the Legislature invaded the province of the Michigan Supreme Court when they arbitrarily selected one statute out of the entire criminal code and ruled that one lesser offense could not be considered by a jury (but could be by a judge) on a criminal trial for that offense. This legislation runs afoul of *Const 1963, art 3, §2* and *art 6, §5*. It also is in direct contravention of *MCL 768.32(1)* in the Code of Criminal Procedure, which demands that in any crime, divided into degrees, all degrees lesser to the one charged must be submitted to a jury, if they fit the facts.

Second, §626(5) violates a defendant's right to trial by jury on all elements of the crime charged, *US Const, Ams VI and XIV; Const 1963, art 1, §14*. A criminal defendant charged with reckless driving causing death must forego his constitutional

right to trial by jury in order to allow a fact-finder to consider a lesser offense, moving violation causing death, such consideration being essential to his due process right to a fair trial.

A last question discussed herein, in response to this Court's inquiry, is whether moving violation causing death is a lesser included offense of reckless driving causing death. Both parties in this cause agree that it is. Defendant Thabo Jones urges the Court to note that the greater offense contains all of the elements of the lesser offense *and* adds one other element: recklessness. Since, in driving an automobile, an act of recklessness must constitute a moving violation, the lesser is necessarily contained within the greater.

For these reasons the trial judge and the Michigan Court of Appeals were correct in their final analyses and the subsection §626(5) is unconstitutional.

STATEMENT OF JURISDICTION

Defendant-Appellee adopts Plaintiff-Appellant's previously submitted Statement of Jurisdiction.

STATEMENT OF QUESTION PRESENTED

MAY THE MICHIGAN LEGISLATURE CONSTITUTIONALLY ENACT A STATUTE WHICH:

- A. CREATES A LAW MAKING RECKLESS DRIVING CAUSING DEATH A 15 YEAR FELONY, WHILE SIMULTANEOUSLY
- B. CREATING A LESSER, INCLUDED MISDEMEANOR MOVING VIOLATION CAUSING DEATH AND
- C. DICTATES THAT IN A PROSECUTION FOR THE FORMER, GREATER OFFENSE, THE JURY SHALL NOT BE INSTRUCTED ON THE LATTER, LESSER, INCLUDED OFFENSE?

- **DOES THE ABOVE LEGISLATIVE SCHEME VIOLATE THE MICHIGAN CONSTITUTION, AS SET FORTH IN THE DOCTRINE OF SEPARATION OF POWERS?**

Defendant Jones answers "yes"

The Court of Appeals answered "yes"

- **DOES THE ABOVE LEGISLATION UNCONSTITUTIONALLY DEPRIVE A DEFENDANT OF THE RIGHT TO TRIAL BY JURY ON ALL ESSENTIAL ELEMENTS OF THE CHARGED CRIME?**

Defendant Jones answers "yes"

The Court of Appeals answered "yes"

- **IS THE CRIME OF MOVING VIOLATION CAUSING DEATH A LESSER INCLUDED OFFENSE OF THE CRIME OF RECKLESS DRIVING CAUSING DEATH?**

Defendant Jones answers "yes"

The Court of Appeals answered "yes"

The People answer "yes"

STATEMENT OF FACTS

Defendant, THABO JONES, was charged by the Wayne County Prosecutor with a fifteen (15) year felony, Reckless Driving Causing Death, contrary to *MCL 257.626(4)*. Before trial defendant filed a "Motion in Limine to Allow Jury to Hear Lesser Included Offenses" [Moving Violation Causing Death, *MCL 257.601d* and Reckless Driving, *MCL 257.626(2)*].

The trial judge, the Honorable Richard M. Skutt, granted that motion based on the fact that *MCL 257.626(5)*, which prohibits giving a jury instruction on Moving Violation Causing Death is unconstitutional as a violation of the doctrine of separation of powers. The trial court disagreed with defendant that §626(5) also violates defendant's right to a trial by jury on all essential elements of a charged crime.

The People were granted leave to appeal by the Michigan Court of Appeals. That court then upheld the trial court on the separation of powers issue, but also ruled that §626(5) also did violate the right to trial by jury.

This Court has now granted the People's application for leave to appeal on the issues set out in the Statement of Questions; *infra*.

ARGUMENT

***MCL 257.626(5)* IS UNCONSTITUTIONAL UNDER THE DOCTRINE OF SEPARATION OF POWERS, *CONST 1963, ART 3, §2; ART 6, §5*; IT IS ALSO UNCONSTITUTIONAL AS A PARTIAL VIOLATION OF THE RIGHT TO TRIAL BY JURY, *CONST 1963, ART 1, §14*; IT IS ALSO IN DIRECT CONFLICT WITH *MCL 768.32(1)* AND *PEOPLE V. CORNELL, 466 MICH 335 (2002)*.**

INTRODUCTION

The Michigan Court of Appeals in *People v. Jones, 302 Mich App 434 (2013)*, ruled that *MCL 257.626(5)* is unconstitutional in that it forbids a trial judge to instruct a jury when deliberating on a charge of reckless driving causing death to consider the lesser included offense of moving violation causing death. The Court of Appeals ruled that the above section violates the doctrine of separation of powers, because such an enactment is only within the province of this Court and because that limitation effectively deprives a defendant of the right to a jury trial on all essential elements of the crime charged. The Court of Appeal's decision also noted the conflict of this new law with *MCL 768.32(1)* and this Court's decision in *People v. Cornell, 466 Mich 335 (2002)*.

DISCUSSION

- I. THE DOCTRINE OF SEPARATION OF POWERS, *CONST 1963, ART 3, §2; ART 6, §5*, FORBIDS THE MICHIGAN LEGISLATURE FROM EXERCISING POWERS BELONGING TO THE MICHIGAN SUPREME COURT.**

The precise question now before this Court, therefore, is whether a limitation on the submission of necessary lesser included offenses to a criminal jury is a matter of legislative/judicial “substance” or “procedure. Both the majority and dissenting opinions in the Court of Appeals seem to agree on the proposition that this is the question in issue.¹ Thereafter, agreement turns to fundamental disagreement.

¹The dissent forthrightly states:

While the Legislature has the sole power to define crimes and set punishments, *People v. Calloway*, 469 Mich 448, 451, 671 NW2d 733 (2003), the Supreme Court has the power to establish practice and procedure, *People v. Watkins*, 491 Mich 450, 472, 818 NW2d 296 (2012). Therefore, “the Legislature may not enact a rule that is purely procedural, i.e., one that is not backed by any clearly identifiable policy consideration other than the administration of judicial functions.” *People v. Pattison*, 276 Mich App 613, 619 (2007).

People v. Jones, 302 Mich App 434, 446 (2013).

The majority opinion does not seem to disagree:

Cornell [*People v. Cornell*, 466 Mich 335 (2002)] . . . stands for the conclusion that the Legislature sets the substantive law. *Id.* at 353. As noted, the Legislature can therefore define what constitutes a given offense. Pursuant to the definitions it crafts, some of those offenses may constitute necessarily included lesser offenses of other offenses. However, the Legislature is not free to dictate that the courts give instructions to the jury that conflict with substantive law. The courts are to instruct the jury on the law; this is established by statute, MCL 768.29, but also by court rule, MCR 2.513(A) and (N), and, importantly, by the simple fact that a jury not properly informed of the law *cannot* fulfill its duty. See, e.g., *People v. Potter*, 5 Mich 1, 8–9 (1858); *People v. Duncan*, 462 Mich 47, 52–53, 610 NW2d 551 (2000). Correctly instructing the jury, therefore, arguably involves more than mere “substantive law;” it is in fact a fundamental requirement of the fair and proper administration of justice. See *People v. Murray*, 72 Mich 10, 16, 40 NW 29 (1888); *People v. Townes*, 391 Mich 578, 587, 218 NW2d 136 (1974).

Jones, supra, at 441.

The Wayne County Prosecutor argues that the answer to the above question is largely found in this Court's opinion in *People v. Cornell*, 466 Mich 335 (2002).² To the extent argued below, defendant Jones agrees.

As a precedent, the importance of the *Cornell* decision lies in its bright line rule regarding the propriety of the trial court instructing on lesser offenses in criminal felony trials. Before *Cornell* the rule had simply changed over time. The *Cornell* Court, regardless of prior precedent, ruled unambiguously:

Therefore, we hold that a requested instruction on a necessarily included lesser offense *is proper* if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it. To permit otherwise would be inconsistent with the truth-seeking function of a trial, as expressed in *MCL* §768.29. To the extent that our prior decisions, including *Jones*, *Chamblis*, *Stephens*, and *People v. Jenkins*, 395 Mich. 440, 236 N.W.2d 503 (1975) and their progeny conflict with our holding today, they are overruled.

Cornell, *supra*, at 358 (Footnotes omitted).³ (Emphasis added).

²The People cite to *Cornell*, *supra*, over fifteen times and, at one point, correctly assert that *Cornell* largely overturned *People v. Chamblis*, 395 Mich 408 (1975), a decision which forbade instruction in felony cases on lesser included misdemeanors. Defendant Jones agrees that reliance on *Cornell*, *supra*, is correct, especially on cases this Court has decided after *Cornell*. In that regard, only, it should be noted that the People inadvertently miscite *Cornell* as having been decided in "2012", whereas the correct date is "2002". Defendant Jones believes that an accurate disposition regarding how *Cornell*, *supra*, affects this case will be aided in reflection on cases decided by this Court after *Cornell*, e.g. *People v. Nyx*, 479 Mich 112 (2007).

³Although the writer has omitted reference to the above cited footnotes to the opinion, Footnote 11, *supra* cites with approval Justice Ryan's dissent in *People v. Kamin*, 405 Mich 482 (1979), wherein he emphasized the proposition that the facts in the requested lesser offense must be supported by the facts of the case. That admonition is borne out in the instant case. The People would certainly agree that if Thabo Jones was driving improperly (charge: reckless

There should be no doubt that the importance of the *Cornell* decision is that this Court looked to statutory interpretation to conclude that when a lesser included offense, as defined by statute, fits the facts of the charge, i.e., the greater offense has all of the elements of the lesser *and* at least one more, then an instruction on the lesser is proper. Taken simply at face value, that appears to mean that when reckless driving causing death is charged, the lesser included offense, moving violation causing death (which has all of the same elements, save one)⁴ is a proper jury matter for jury consideration.

The People, of course, disagrees and say, contrawise, *Cornell*, stands for a different proposition; one that would call for a different answer to whether a lesser offense here is mandated. The People look to one small section in *Cornell*, which

driving causing death), then clearly he must have at least been also guilty of the requested lesser offense (moving violation causing death).

⁴The elements of reckless driving causing death are:

- a) driving a motor vehicle;
- b) with wanton or willful disregard for safety;
- (c) causing death.

M Crim JI 15.16 ("adopted to reflect changes made to *MCL 256.626*, effective October 31, 2010).

The elements of moving violation causing death are:

- a) defendant committed a moving violation;
- b) the moving violation was the cause of death.

M Crim JI 15.18.

they argue means that the legislature did have the right to forbid a jury instruction in a criminal case on a necessarily included lesser offense. This brief language is repeatedly cited by the People as follows:

As this Court has recognized, matters of substantive law are left to the Legislature. *People v. Glass (After Remand)*, 464 Mich 266, 281, 627 NW2d 261 (2001); *McDougall v. Schanz*, 461 Mich 15, 27, 597 NW2d 148 (1999). Determining what charges a jury may consider does not concern merely the “judicial dispatch of litigation.” *Id.*, at 30. Rather, the statute concerns a matter of substantive law.

Cornell, *supra*, at 353.

There are two responses to the above quote, either or both of which demonstrate that the above excerpt does *not* change the true effect of *Cornell*, which, in fact, guarantees the right of defendants in criminal felony cases to have jurors instructed on included offenses which fit the facts as lesser offenses.

First, it should be noted that the words cited above amount to *dicta* in that case. It must be remembered that the *Cornell* Court was not putting a seal of approval on limiting lesser included offenses through legislative fiat. Quite the opposite -- *Cornell*, concerned whether necessarily included *misdemeanor* offenses could be refused, even if they fit the facts, in a felony prosecution. The Court, interpreting a statute, relied on heavily by defendant herein, *MCL 768.32(1)*, ruled that said statute requires that in a prosecution for a crime which is divided into degrees, lesser

offenses *must* be instructed on as long as the lesser offense fits the facts. Therefore, the People use *Cornell* to attempt to subvert what that case actually stands for.⁵

The statute in questions, *MCL 768.32(2)*, provides:

Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment *and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment*, or of an attempt to commit that offense. (Emphasis added).

Cornell, supra, to reach its decision, holding the statute controlling, immediately after citing that statute, notes that “*MCL 768.32 requires* the court ‘to instruct the jury as to the law applicable to the case’ and indicates that ‘[t]he failure of the court to instruct the jury on any point of law shall not be ground for setting aside the verdict of the jury *unless such instruction is requested by the accused.*’” *Cornell, supra*, at 341. (Emphasis added).

It is difficult to conceive how the above language, when applied to the instant case, can have a meaning other than that if a defendant requests an instruction on the lesser offense of moving violation causing death, when charged with reckless driving

⁵It must be remembered here that following the cited language in *Cornell, supra*, comes the admonition that “in our opinion, it is necessary to return to the statute [*MCL 768.32*] and the construction it was given by the *Hanna* Court [*Hanna v. People*, 19 Mich 316 (1869)] and by Justice Coleman in her dissent in *Jones* [*People v. Jones*, 395 Mich 379 (1975)]. As will be demonstrated later in this Brief, both *Hanna, supra*, and Justice Coleman dissent in *Jones, supra*, stand for the proposition that both statute and Supreme Court precedent guarantee the right to jury instructions on lesser included offenses.

causing death, either he gets the instruction or the offending court commits reversible error.

The People argue that *MCL 257.626(5)*, which regardless of the above controlling law, says not only that a judge doesn't have to give the requested instruction, but actually that the instruction *can never* be given, is not only a proper legislative exercise, but overrules precedent in this Court dating to 1869⁶ and statutory precedent to 1846.⁷

Part of the People's misguided position can be traced to their reliance on the distinction between "substantive" and "procedural" law, which they rely upon to reach their interpretation of *Cornell* as cited above. Two difficulties, again, are presented by such reliance.

First, this Court must find that *MCL 257.626(5)* is really substantive law, which it isn't. Second, even if it were, then it is in direct conflict with *MCL 768.32(1)*. Either way, the People's theory can't prevail.

A. IS THE STATUTE *MCL 257.626(5)* SUBSTANTIVE OR PROCEDURAL.⁸

⁶See *Hanna, supra*.

⁷*Cornell, supra, at 341, citing 1846 RS, ch. 16, §16.*

⁸This Court has noted that "we appreciate the difficulty that attends the drawing of the line between 'practice and procedure' and substantive law. That the task is difficult and one that must be made on a case-by-case basis is no legitimate challenge to our constitutional duty to draw that line in a fashion that respects this Court's constitutional authority as well as that of the

The question is obviously definitional and therefore a working definition of the terms seems reasonable. Black describes “substantive law” as: “That part of law which creates, defines, and regulates rights and duties of parties, as opposed to ‘adjective, procedural, or remedial law’ which prescribes method of enforcing the rights or obtaining redress for their invasion.”⁹ “Procedural law”, if further definition is necessary, according to Black is “That which prescribes method of enforcing rights or obtaining redress for their invasion.”¹⁰

If it is necessary to determine whether §626(5) is substantive or procedural, and defendant argues that it not, nevertheless that particular section seems to fit the procedural description hand-in-glove. The subsection does not create or define a crime, as do subsections (2) & (4) of the same statute. It concerns nothing but a jury instruction limitation for a substantive offense, reckless driving causing death. Jury instructions, without need for citation, have always been under the control of the judiciary.

On the other hand *MCL 768.32*, which the *Cornell* Court, in *dicta*, says is “substantive”, does have definitional indicia of being just that. It regulates generally

Legislature . . . it is ultimately this Court that will determine in each instance where the substance/procedure line must be drawn.” *McDougall v. Schanz*, 461 Mich 15, 36 (1999).

⁹Black’s Law Dictionary, (6th ed.), p. 1429.

¹⁰Black’s Law Dictionary, (6th ed.), p. 1203.

the rights of defendants and the duties of judges in all cases of a certain class. Therefore, using the People's own reliance on *Cornell* leads necessarily to the conclusion that the Legislature may well have had the right to set a *general* rule demanding the giving of lesser offense instruction for all defendants charged with offenses which have lesser included components; however, on the other hand, the Legislature cannot arbitrarily pick one single offense and then legislate that on that one offense, a particular lesser offense is precluded. That's simply not substantive law.¹¹

B. IF MCL 257.626(5) IS SUBSTANTIVE LAW, WHAT RIGHTS REGARDING LESSER OFFENSES ARE VESTED IN THE LEGISLATURE, RATHER THAN THE SUPREME COURT.

This Court should not wish to interpret §626(5) in a manner so that such interpretation could infringe constitutional due process rights.¹² However, if the Legislature has the complete authority to set and un-set lesser offenses, then it follows that the Legislature can dictate that murder of the second degree is no longer an

¹¹Here, it would appear the People, while relying so heavily upon *Cornell* have found themselves hoist upon their own petard.

¹²The United States Supreme Court has held regarding such interpretation that "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 US 394, 401; 36 S Ct 658; 60 L Ed 1061 (1916), citing *United States ex rel Attorney General v. Delaware and Hudson Co.*, 213 US 366, 404; 29 S Ct 527; 53 L Ed 836 (1909), cited in *People v. Nyx*, 479 Mich 112, 124, fn 34 (2007).

offense that a jury can consider in a prosecution for murder of the first degree, even if the facts fit a second degree conviction. The United States Supreme Court found that statutory scheme unconstitutional in *Beck v. Alabama*, 447 US 625; 100 S Ct 2382; 65 L Ed 2d 392 (1980). The People argue that *Beck, supra*, is not binding precedent, but certainly its logic is very persuasive in determining the due process right to a fair trial.¹³

Of course if the above were true, then the next step would be just as easy. If the Legislature were unfettered in the matter of deciding the why and when of jury instruction on criminal offenses, then they must also be free to say that cognate lesser offenses may be given, or must be given, even when obviously they don't fit the facts in a criminal prosecution. Equally obvious is the fact that the Legislature would be free to pick and choose among crimes indiscriminately, to decide which may allow lesser included and/or cognate offenses. Then there need be no legislative purpose behind the decision -- just as there appears to be no purpose for regarding the

¹³It may very well be, as the People assert, that *Beck, supra*, was decided on Eighth Amendment grounds, involving the death penalty and thus is not precedent here. The absence of the death penalty possibility for defendant Thabo Jones, however, does not bury the due process logic of *Beck*. Without reference to the death penalty the Supreme Court in *Beck* "found that the accuracy of the fact finding process was placed in doubt when the jury was deprived of the opportunity to consider the lesser-included offense of felony murder, which did not include the death requirement." *Campbell v. Coyle*, 260 F.3d 531, 540 (CA 6, 2001).

selection of reckless driving causing death to be the only crime, save one,¹⁴ for which necessarily lesser included offenses are forbidden.

If the above, would-be scenario were true, the total purpose of *Cornell* would be defeated. But the above is not true, as demonstrated in Section (c), below.

C. DOES DUE PROCESS DEMAND GIVING NECESSARY LESSER INCLUDED OFFENSES WHERE THE LESSER OFFENSE FITS THE FACTS.

The seminal decision of this Court in *Cornell* was not some exercise in judicial legislation, which established a new right to jury instructions, *circa* 2002. No, *Cornell* by its terms was rooted in tradition going back 150 years.¹⁵ The majority opinion, for example, cites to Gillespie's Michigan Criminal Law & Procedure, (2d ed), §674, pp. 863-864 that "it is not error to admit an instruction on such lesser offenses, where the evidence tends to prove the greater . . ."¹⁶ The converse of the proposition must be obvious: If a lesser offense fits the facts and *is* requested, it is reversible error to deny it (or so it would seem, unless the charged offense is reckless driving causing death). Even then, in the case of that one crime, somehow the Legislature chose to create an anomaly in that, per the limiting statute, §626(5), a jury

¹⁴See, *MCL* 768.32(2).

¹⁵See footnotes 6 and 7, *supra*.

¹⁶Cited as controlling in *People v. Patskan*, 387 Mich 701, 711 (1972). *Cornell*, *supra*, further cites *People v. Netzel*, 295 Mich 353 (1940); *People v. Kolododrieski*, 237 Mich 654 (1927) at 355.

could still be instructed on the lesser included offense of simple reckless driving (*MCL 257.626(2)*).

Much more importantly though, the *Cornell* Court found the United States Supreme Court's opinion in *Sansone v. United States*, 380 US 343; 185 S Ct 1004; 13 L Ed 2d 882 (1965) "instructive on this point."¹⁷ Comparing *MCL 768.32(1)* to *Rule 31(c)* of the Federal Rules of Criminal Procedure, which is almost identical¹⁸, *Cornell* quotes *Sansone*, *supra*, as follows:

Thus, in a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie(s) it . . . (*is*) entitled to an instruction which would permit a finding of guilt of the lesser offense. . . . In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense.

Sansone, *supra*, at 349-350. (Emphasis added).

Based at least in part by the above "instructive point", *Cornell* unambiguously rules that:

We believe that this analysis is consistent with our prior case law and equally applicable to *MCL §768.32*. Therefore, we hold that a requested

¹⁷*Cornell*, *supra*, at 356.

¹⁸*Fed R Crim P 32(c)* provides that a "defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it. To permit otherwise would be inconsistent with the truth-seeking function of a trial, as expressed in *MCL §768.29*.

Cornell, supra, at 357-358 (Footnotes omitted).

Five years after *Cornell* this Court continued to find that the rule set down legislatively in *MCL 768.32(1)* was rooted firmly in court decisions which long pre-date the statute. In *People v. Nyx*, 479 Mich 112 (2007), the Court noted that “As early as 1861, this Court pointed out in *People v. McDonald* that ‘it is a general rule of criminal law, that a jury may acquit of the principal charge and find the prisoner guilty of an offense of a lesser grade, if *contained within it*.’ Then in 1869, in *Hanna v. People*, this Court considered a similarly worded predecessor of *MCL 768.32(1)* and held that the statute should ‘be construed as extending to all cases in which the statute has substantially, or in effect, recognized and provided for the punishment of offenses of different grades, or degrees of enormity, *wherever the charge for the higher grade includes a charge for the less*.’” *Nyx, supra, at 119*. (Emphases in original) (Footnotes omitted). It should be noted that in one of the above omitted

footnotes, *Nyx* cites to United States Supreme Court precedent, calling the above principle “an ancient doctrine of the common law . . .”¹⁹

Therefore, the proposition urged by defendant Thabo Jones, that *MCL* 768.32(1), which would force a trial judge to give the necessarily lesser included instruction in this case, is a fundamental rule of jurisprudence in this state, which can not be lightly and arbitrarily swept away by creating one particular criminal offense and exempting it from due process.

To reach an answer to the question proposed herein, defendant Jones realizes that this Court *may* have to rule on what effect to give to the fact that *MCL* 768.32 has two subsections. Subsection (2) *may* be problematic. In this regard, should this Court ask the question of how the fact that that subsection, seemingly at odds with subsection (1), allows that in a prosecution for a major drug offense (*MCL* 333.7401 or 7403) “[a] jury shall not be instructed as to other lesser included offenses involving the same controlled substance . . .”

Many attempts at an answer may be realistic; however, the proposal put forward by defendant herein is the most direct, namely, *MCL* 768.32(2) is also unconstitutional. That argument is hardly novel, nor does it lack logic or prior judicial support (if not *binding* authority). Both this Court and the Michigan Court

¹⁹*Schmuck v. United States*, 489 US 705, 717-718; 109 S Ct 1443; 103 L Ed 2d 734 (1989).

of Appeals have considered the question. In *People v. Binder (on remand)*, 215 Mich App 30 (1996), the court clearly found MCL 768.32(2) unconstitutional on many of the grounds argued here, stating: “We find unconstitutional the portion of MCL 768.32(2) prohibiting both a jury instruction and a finding of guilty involving any drug offense other than a ‘major controlled substance offense’ when the charge is delivery. Const 1963, art 6, §5.” *Binder, supra*, at 42. *Binder, supra*, has not been overruled, although it is not binding precedent because that portion of the decision on the constitutionality of the statute was found by this Court to be *dicta*. *People v. Binder*, 453 Mich 915 (1996). Apparently then, the question of constitutionality is unresolved and has remained so for 18 years. Defendant Thabo Jones, if this Court feels that the instant case is the proper vehicle for re-testing the constitutionality of §32(1) on principles set out herein, welcomes the opportunity to be that vehicle.

This Court has referred to its holding in *Cornell* as a “bright line rule.” *Nyx, supra*, at 122. Defendant here agrees, especially as that rule effectively says that when the prosecution charges a criminal offense which is divided into greater and inferior degrees, and a defendant is charged with the greater offense, he is entitled to a jury instruction on the inferior offense if the facts fit. Superimposed onto the instant situation, Thabo Jones is charged with a greater offense; an inferior offense fits the

facts; therefore Thabo Jones is entitled to a jury instruction on that offense. A legislative fiat, which is clearly procedural, cannot change that inescapable fact.

II. A DEFENDANT'S RIGHT TO TRIAL BY JURY ON ALL ESSENTIAL ELEMENTS OF A CRIME CHARGED CANNOT BE DEPRIVED BY LEGISLATION.

The Sixth Amendment to the United States Constitution, guaranteeing the right to trial by jury for all serious crimes, stands second to none in our history's safeguards of personal liberty.²⁰ It's adoption into the current Michigan Constitution was noted by the United States Supreme Court.²¹ This Court has been no less vigilant in safeguarding an accused's right to have a jury properly instructed on the law regarding the elements of the criminal charge. It was so held in *People v. Duncan*, 462 Mich 47, 48 (2000):

We issue this opinion to iterate a bright line rule: It is structural error requiring automatic reversal to allow a jury to deliberate a criminal charge where there is a complete failure to instruct the jury regarding any of the elements necessary to determine if the prosecution has proven the charge beyond a reasonable doubt.

One of the reasons that lesser included offenses exist is fairly obvious. Crimes are often made up of multiple elements and a defendant may be guilty of some, but

²⁰“The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta.” *Duncan v. Louisiana*, 391 US 145, 151; 88 S Ct 1444; 20 L Ed 2d 491 (1968).

²¹*Duncan, supra*, at 154, fn 22.

not all, of those elements. Sometimes that situation must rightly result in a complete acquittal.²² But a jury *must* be instructed on *all* the elements, or it is simply misinformed and then the jury will be allowed to improperly speculate. In *People v. Duncan, supra*, this Court spoke to the impropriety of this situation. “As we stated in *People v. Lambert*, 395 Mich 296, 304 (1975), juries cannot be allowed to speculate. The court must inform the jury of the law by which its verdict must be controlled. Incontrovertibly, when a jury is allowed to speculate, the subsequent verdict is not a reliable indicator of defendant’s guilt or lack thereof.” *Duncan, supra*, at 52.

Thabo Jones is charged with reckless driving causing death and he may be guilty thereof, if he drove recklessly. But, if he was only exceeding the speed limit by five miles over, and not otherwise reckless, and that speeding caused the death of the complainant, should the jury find him not guilty if his actions comprise the lesser offense of moving violation causing death? If the lesser offense is not given to the jury, is the jury not impermissibly misinformed “of the law by which its verdict must be controlled”? *Duncan, supra*.

²²For example, a person could be charged with the offense of possession with intent to distribute marijuana (MCL 333.7401). The elements are (1) the possession and; (2) the intent. If the defendant never has possession, no crime is committed, regardless of his intention. Conversely though, the element of possession alone, without intention to distribute, can be a lesser included crime. In the case of all crimes in this state where there are inferior degrees of that crime, the jury must be instructed on those inferior crimes. MCL 768.32(1).

It seems that the Michigan Court of Appeals majority thought the answer to the last questions was “yes”. “*MCL 257.626(5)* is an infringement on the exclusive role of the judiciary of effectuating procedure to vindicate constitutional rights, as well as an infringement of criminal defendant’s fundamental right to a properly-instructed jury.”²³

The People, in their Brief, claim no such right exists. “Defendant has argued that ‘the constitutional right to a jury properly instructed on *all elements of the crime* renders the exclusion in *MCL 257.626(5)* unconstitutional’. But this is not so.”²⁴ If the argument above is not sufficient to demonstrate that: “yes, it is so”, defendant presents further argument, both direct and by analogy to prove it.

An analogy is clearly presented by the United States Supreme Court’s unanimous decision, delivered by Mr. Justice Scalia in *United States v. Gaudin*, 515 US 506; 115 S Ct 2310; 132 L Ed2d 444 (1995). In that case defendant was charged with making false statements on loan documents to a federal agency. The materiality of those statements was an element of the crime. The trial judge ruled that he, and not the jury, could rule on materiality. The Ninth Circuit Court of Appeals reversed on Fifth and Sixth Amendment grounds and the Supreme Court agreed, holding:

²³*People v. Jones*, 302 Mich App 434, 443 (2013).

²⁴Appellant’s Brief, p. 13 (Emphasis supplied by the People), citing to Defendant’s Answer to the People’s Application for Leave to Appeal, p. 7.

The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without “due process of law”; and the Sixth, that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” We have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.

Gaudin, supra, at 509-510 (Footnote omitted).

The requirement, which interpretations of the Sixth Amendment stress, is the right to jury determinations, as opposed to a defendant being forced to have a crucial issue decided exclusively by a judge. The “essential feature of a jury is the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . . [in] that group’s determination of guilt or innocence.”

Williams v. Florida, 399 US 78; 90 S Ct 1893, 1905; 26 L Ed 2d 446 (1970).²⁵

²⁵The Supreme Court, too, could resort to syllogistic logic in *Gaudin, supra*. “Thus far, the resolution of the question before us seems simple. The Constitution gives a criminal defendant the right to demand that a jury on all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have a jury decide materiality.” *Id.*, at 511.

Hence also, in a syllogistic vein:

1. A Michigan statute (MCL 768.32) gives all criminal defendants the right to have a jury instruction on all necessary lesser included offenses;
2. reckless driving causing death contains a necessary lesser included offense of moving violation causing death;
3. therefore, a jury in a prosecution for reckless driving causing death must be instructed on moving violation causing death.

It simply must not be forgotten in this presentation that in the statutory scheme before this Court, if a criminal defendant wants a fair determination of what caused the death of a complainant: recklessness (either a felony or a misdemeanor) or moving violation (possibly a civil infraction), he must forego his right to trial by jury and have that fact decided *only* by a judge. The statute, §626(5), is clear and explicit in stating that a *jury* cannot even be told that the lesser included offense exists, while apparently allowing a judge in a bench trial to recognize the lesser offense and pass judgment on it.²⁶

The criminal jury is more than a mere fact finder. A jury does not simply determine the facts, but also has a constitutional responsibility to apply the law to those facts and then draw the ultimate conclusion of guilt or innocence -- on the crime charged or a lesser offense. *Gaudin, supra*, at 514. *Gaudin* then directs attention to *Court of Ulster City v. Allen*, 442 US 140, 156; 99 S Ct 2213, 2224; 60 L Ed 2d 777 (1979). *Allen, supra*, states that this additional responsibility can help

the trier of fact to determine the existence of an element of the crime—that is, an “ultimate” or “elemental” fact—from the existence of one or more “evidentiary” or “basic” facts Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the fact finder's responsibility at trial, based on evidence adduced by the State, to find the *ultimate* facts beyond a reasonable doubt. (Emphasis original).

²⁶This “unique” statute does not in any way foreclose consideration by judge or jury of the misdemeanor of simple reckless driving. MCL 257.626(2).

Defendant Thabo Jones, and the United States Supreme Court, translate the above to mean “The right to [trial by jury] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of guilt.” *Sullivan v. Louisiana*, 508 US 275, 277; 113 S Ct 2078, 2080; 124 L Ed 2d 182 (1993); See also, *Patterson v. New York*, 432 US 197, 204; 97 S Ct 2319, 2324; 53 L Ed 2d 281 (1977); *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 1072 25 L Ed 2d 368 (1970). All cited in *Gaudin, supra*, at 515.

All aspects of the criminal justice system which trench upon determination of guilt or the degree of guilt or punishment must be viewed in the context of the proposition that government cannot arbitrarily shut the jury out of a defendant’s right to a constitutionally fair determination of his rights. Courts in this century have greatly expanded, rather than restricted, the jury’s constitutional role.²⁷

The set of laws set into motion by the Michigan Legislature, effective October 31, 2010, accomplished a broad stroke in revamping the Michigan Motor Vehicle Code. Negligent homicide (formerly *MCL 750.325*) was abolished by PA 2008, No.

²⁷Factual determinations required to increase federal sentences must be decided by a jury. *Apprendi v. New Jersey*, 530 US 466; 120 S Ct 2348; 147 Ed 2d 435 (2000). A determination of “deliberate cruelty”, which could greatly increase a state sentence, had to be submitted to jury determination. *Blakely v. Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In the context of the question of whether the rights herein are substantive or procedural, *Blakely, supra*, is at least persuasive: “the right of jury trial . . . is no mere *procedural* formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.” *Blakely v. supra*, at 306. (Emphasis added).

463 and replaced by reckless driving causing death, *MCL 257.626(4)* and moving violation causing death, *MCL 257.601d*. Other new crimes such as driving with presence of THC causing death and/or serious physical impairment, *MCL 257.625*, as well as driving on revoked or suspended license causing death, *MCL 257.904(4)*, were also created. The obvious good intention was to strike an effective blow against dangerous drivers. These new provisions appear generally to be without constitutional infirmity. In the fullness of the legislation, however, one “peculiar” provision got through the net of legislative scrutiny and became the law. *MCL 257.626(5)*, without an obvious need for its existence, declared by fiat that when the charge was reckless driving causing death, a jury had to be kept in the dark about the fact that there was an inferior offense, moving violation causing death, that might be the correct charge in the mind of the jury. With one exception (*MCL 768.32(2)*) no other legislation exists. That one exception, above, was weighed in the Michigan Court of Appeals and found wanting. See *People v. Binder*, 215 Mich App 30 (1996), vacated in part, 453 Mich 915 (1996)

Thabo Jones, now charged with that greater offense, asked his trial judge, in spite of the above, now-questioned statutory provision, to instruct his jury on a lesser offense (as a Michigan statute, *MCL 768.32(1)*, says he must). The trial judge agreed; the prosecutor disagreed and appealed to the Michigan Court of Appeals. A majority

of that court agreed with Mr. Jones and the trial judge. The prosecutor again disagrees and the matter is now before this Court for ultimate disposition.

III. MOVING VIOLATION CAUSING DEATH IS A NECESSARY LESSER INCLUDED OFFENSE TO THE CRIME OF RECKLESS DRIVING CAUSING DEATH.

The People begin their Brief in this cause with a commendable admission, which, while it does not remove the issue from consideration, at least demonstrates that the parties before this Court are in agreement that the inferior offense, moving violation causing death, *is* a necessarily lesser included offense to reckless driving causing death. The People admit that “[t]hroughout these proceedings, the People have conceded that the offense known as moving violation causing death is a subset of the elements of the offense known as reckless driving causing death.”²⁸

However, the People allocute this concession with gritted teeth, noting that it may be “rash”²⁹; nevertheless, to their credit they do not at all argue to the contrary. Appellee Jones therefore will present a few brief references on point, since the Court has clearly indicated that the question should be answered.

²⁸In passing, the People have made this concession only “throughout” the *appellate* phase of these proceedings. At the motion hearing in the trial court, the assistant prosecutor stated “I believe it’s [moving violation causing death] not a lesser, included offense simply because the statute says you’re not allowed to consider it” (Transcript on Motion, October 12, 2012, Appellant’s Appendix, p. 30A). It merits notice only because in later sections of their Brief, it is the *People* who accuse *defendant* and the Michigan Court of Appeals of “tautology”. See Appellant’s Brief, p. 26.

²⁹See Appellant’s Brief, p. 3.

This Court not long ago ruled on the issue of what constitutes a lesser included offense in the context of jury instructions, as follows: “A lesser offense is necessarily included in the greater offense when the elements necessary for the commission of the lesser offense are subsumed within the elements necessary for the commission of the greater offense.” *People v. Wilder*, 485 Mich 35, 41 (2010). See also, *People v. Mendoza*, 468 Mich 527, 540 (2003). “A necessarily lesser included offense is one whose elements are completely subsumed in the greater offense.”

This definition, is, of course, accurate and does fit the facts herein. The elements necessary for the lesser offense here are: (1) driving a car; (2) committing some violation of the Motor Vehicle Code; and (3) causing a death. All these are subsumed into reckless driving causing death. That is, unless one can drive recklessly without violating the Code. Current counsel, in mentally reviewing driving acts which could be reckless, believes they are all codified as misdemeanors or civil infractions as long as *driving* a vehicle is concerned.

The above Michigan courts’ definitions may be slightly remiss in that they don’t plainly enunciate the obvious: the greater offense must have an element not found in the lesser offense. It seems an oversight at most to what should be apparent. If that is of any significance to this Court, a federal definition may fill the void. The

United States Supreme Court in *Sansone v. United States*, 380 US 343, 350; 85 S Ct

1004; 13 L Ed 2d 882 (1965), commented as follows:

The basic principles controlling whether or not a lesser-included offense charge should be given in a particular case have been settled by this Court. *Rule 31(c) of the Federal Rules of Criminal Procedure* provides, in relevant part, that the 'defendant may be found guilty of an offense necessarily included in the offense charged.' Thus, '(i)n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie(s) it . . . (is) entitled to an instruction which would permit a finding of guilt of the lesser offense.' But a lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses. In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense. (Authorities omitted).

It may constitute a great deal of verbiage and a roundabout way of coming to the point, but this, Appellee Jones believes, it's the best total definition to answer the stated question. The greater offense has all the elements of the lesser, then adds one: reckless driving. All of the elements are included in the lesser, save reckless driving. *Ergo*, moving violation causing death is indeed a lesser and included offense of reckless driving causing death. This is the only answer Appellee Thabo Jones has to offer.

The majority of the Michigan Court of Appeals below were right on all of their findings. In the order considered here:

First, the Legislature invaded the exclusive province of this Court when they dictated that with reference to one, and only one, criminal offense, a jury may not consider a necessary lesser included offense (while a judge, without a jury, may do so). This violates the doctrine of separation of powers. *Const 1963, art 3, §2; art 6, §5.*

Second, defendant Thabo Jones was denied his constitutional right to a jury determination of every element of his case by *MCL 257.626(5)*, in that this subsection prevented a jury from determining whether he committed moving violation causing death, rather than reckless driving causing death. *US Const, Am VI and XIV; Const 1963, art 1, §14.*

Third, moving violation causing death is a lesser included offense of reckless driving causing death.

The Michigan Court of Appeals decision herein, therefore, should be affirmed.

SUMMARY AND RELIEF

WHEREFORE, Defendant Thabo Jones asks this Court to affirm the decision of the Michigan Court of Appeals.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'James C. Howarth', is written over a horizontal line.

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